IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2013
No. 1565

RAY SULLIVAN, ET AL.

Appellants

vs.

QW PROPERTIES, LLC

Appellee

Appeal from the Circuit Court for Anne Arundel County
(The Honorable Paul F. Harris, Jr.)

APPELLANTS' BRIEF

Nicholas W. Schwandner
Harrison Law Group
40 W. Chesapeake Ave., Ste. 600
Towson, MD 21204
(410) 832-0000
NSchwandner@harrisonlawgroup.com

Counsel for Appellants,
Ray Sullivan and Mary Mulvihill

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STATEMENT OF THE CASE

This case arises from QW Properties, LLC's application (the "Application") to the Annapolis Board of Appeals for approval to construct a large residential planned development. The Board of Appeals reviewed the proposed development as to six criteria set out in Annapolis City Code § 21.24.090.

The Board of Appeals held that QW Properties, LLC failed to demonstrate compliance with three of the six review criteria and denied the Application. Specifically, the Board of Appeals found that QW Properties, LLC (i) failed to demonstrate the proposed design took into account the natural characteristics of the site in the placement of the structures; (ii) failed to demonstrate the proposed vehicular circulation system was adequate, safe, and efficient; and (iii) failed to demonstrate the proposed infrastructure would ensure adequate water utilities.

QW Properties, LLC appealed to the Circuit Court for Anne Arundel County. The Circuit Court reversed the Board of Appeals' denial and ordered that the Application was approved based on its finding that the Board of Appeals' voting procedure was arbitrary and capricious.

Appellants, Ray Sullivan and Mary Mulvihill, now appeal to this Court requesting that the Circuit Court's improper order be reversed and the Board of Appeals' denial of the Application reinstated.

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE BOARD OF APPEALS' INTERPRETATION OF ITS OWN VOTING PROCEDURE RULE WAS ARBITRARY AND CAPRICIOUS.

II. WHETHER THE BOARD OF APPEALS' DENIAL OF THE APPLICATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

III. WHETHER THE BOARD OF APPEALS' WRITTEN OPINION SUFFICIENTLY RECITED ITS FACTUAL FINDINGS UNDERPINNING ITS DENIAL OF THE APPLICATION.

STATEMENT OF FACTS

This appeal arises from the Annapolis Board of Appeals' denial of Appellee, QW Properties, LLC's ("QW Properties") Application to build the "Reserve at Quiet Waters," a residential development consisting of 156 lots (86 townhouses and 70 single-family residences) on 39.67 acres of land located in Annapolis, Maryland (the "Proposed Development"). (E. 271). The location of the Proposed Development is in a highly developed area adjacent to two existing housing communities and the largest park in Anne Arundel County, Quiet Waters Park. (E. 20).

Prior to review by the Board of Appeals (the "Board"), the Proposed Development was evaluated by the Annapolis Department of Planning and Zoning ("Planning Department") and the Annapolis Planning Commission (the "Planning Commission"). Under the review structure in place at the time of the Application, the Planning Department and the Planning Commission served as preliminary review bodies and provided only recommendations to the Board. The Board was responsible for the final judgment on whether to approve the Application.

The Planning Department recommended approval of the Proposed Development, but only recommended approval "subject to [42] enumerated Conditions." (E. 41). The conditions included, inter alia:

> 8. The applicant shall execute an indemnification agreement per the Department of Public Works for a municipal easement over the private alleys for trash collection.
>
> 13. Proposed water and sewer utilities between Tranquility Way and Stilly Way through Conservation Property "C" and "D" shall be directionally [bored] under the existing forest and ephemeral channel with the goal of little to no disturbance to the forest, ephemeral and wetland areas.
>
> 14. Grading and disturbance shall be eliminated in the southwest corner of the development so as to preserve existing forest and soil structure providing for natural regeneration and buffering adjacent to Quiet Waters Park. Attempting to maintain a 100 foot buffer is the goal within this area.
>
> 17. The applicant/developer shall make payment to the City Finance Director of all applicable school impact fees assessed by Anne Arundel County, or submit acceptable proof that the project is not subject to the county's school impact fees, prior to the issuance of any grading permit.

(E. 41-46).

The Proposed Development was next reviewed by the Annapolis Planning Commission. One member of the Planning Commission recommended complete denial of the Proposed Development. The remaining five members recommended approval, but again, only subject to a series of enumerated conditions. The Planning Commission recommended addition of further conditions for a total of 48 conditions. For example, the Planning Commission recommended an additional requirement of:

> 40. The wetland openings at road crossing shall be expanded; Tranquility Way shall be realigned to reduce impact on all wetlands (whether permanent or occasional); Units 73 and 29 shall be eliminated.

(E. 39).

The Proposed Development then proceeded to the Board, who was responsible for issuing the final judgment on the Application as to compliance with Annapolis City Code § 21.24.090(A)-(F). The criteria for which the Board determined QW Properties failed to meet its burden, and are at issue in this appeal, are criteria A, B, and F:

> "The planned development is *compatible with* the character of the surrounding neighborhood and the Comprehensive Plan and *the purposes of planned developments*."
> § 21.24.090(A) (emphasis added).

> "The proposed locations of buildings, structures, open spaces, landscape elements, and pedestrian and *vehicular circulation systems are adequate, safe, and efficient* and designed to minimize any adverse impact upon the surrounding area."
> § 21.24.090(B) (emphasis added).

> "The planned development plan includes adequate provision of public facilities and *the proposed infrastructure, utilities* and all other proposed facilities *are adequate* to serve the planned development and adequately interconnect with existing public facilities."
> § 21.24.090(F) (emphasis added).

The Board provided a hearing process for the Application that was exemplary. The Board held hearings over the course of three days. It accepted testimony from QW Properties and concerned citizens (many of which had expert credentials). The hearings amassed hours of oral testimony and numerous written exhibits. The hearings were chaired by Christian Elkington, an attorney, who ensured that testimony remained relevant to the criteria at issue.

Although QW Properties put forth several experts during the hearings, there was substantial credible testimony that disputed QW Properties' witnesses. For example, regarding criterion A, QW Properties' witness testified the Priority 1 forest stand could

be removed and built upon because it was of low value. That premise was disputed by Ross Geredien, an environmental scientist specializing in landscape ecology and conservation planning. Mr. Geredien testified that the trees were just going through a natural life cycle and "[i]n all likelihood these dying trees will give way to younger oaks, hickories, maples and other longer lived and more shade tolerant hardwood species. (E. 482, 485-488).

Regarding criterion B, the Annapolis Regional Transportation Management Association ("ARTMA") submitted a letter to the Board indicating "ARTMA staff has reviewed the traffic impact assessment that was performed for this development." It explained that, "[t]he known difficulties of Forest Drive traffic congestion are: multiple intersections operating at or beyond capacity [and] an inability to increase the capacity of Forest Drive beyond its present state..." Further, "Forest Drive is the arterial spine of a peninsula and as such operates very much like a long dead end street. What goes in for the most part must come out. More importantly trips generated by a housing development such as Quiet Waters Reserve deep within the peninsula will impact the entire length of Forest Drive." Based on its review, ARTMA unequivocally opposed the development. (E. 85).

Regarding criterion F, Richard Long, a licensed professional engineer in the State of Maryland, testified that current water pressure conditions in the area of the Proposed Development were "absolutely terrible." (E. 523). He had previously tested the static water pressure on his house twice and both times the pressure was at the Annapolis Public Works Department minimum pressure requirement. (E. 523). He expressed that

his main concern was the water pressure supply for fire hydrants. Mr. Long had done preliminary calculations and determined that after the development tied into the water lines there was potential that there might not be adequate pressure for the "needed fire flow" of 1,000 gallons per minute for an hour. (E. 524).

After the three days of testimony, the Board held its oral deliberation during the fourth hearing on September 19, 2012. To deliberate the Board discussed each criteria under § 21.24.090 individually and recounted some of the testimony they found particularly crucial.

For example, regarding the traffic criterion, Board Member Zazzali stated his concern was that "there was not a lot of evidence to suggest that [egress from the Proposed Development] would be safe, available, and compatible to be done." (E. 622). Later in the deliberations, Chairman Elkington echoed those concerns regarding traffic safety. He stated that considering the infrastructure agreement between QW Properties and the City and studies that had been performed he found the infrastructure agreement inadequate. (E. 670). Chairman Elkington raised that there were "too many open-ended questions regarding whether or not the City and the County can get together as to whether or not an appropriate infrastructure can be provided and whether safety can be ensured for the people that use that road from other developments." (E. 670).

Regarding the water utility criterion, Chairman Elkington raised the testimony of Richard Long, who had testified that water pressure was already low in the surrounding area and an additional decrease could create a fire hazard from low hydrant pressure. (E. 653-654). Board Member Gregory also stated that he was concerned that the water

utilities agreement between QW Properties and the City of Annapolis was not adequate. (E. 657-658).

After each Board Member had discussed his or her findings and concerns regarding the Proposed Development, the Board proceeded to vote. Chairman Elkington opened the voting process by stating that they would first vote on whether the Application would be approved and then afterwards, if it was to be approved, they would address the conditions proposed by the Planning Department and Planning Commission. Specifically, Chairman Elkington stated, "[b]efore we can consider any possible applicable requirements for the project we need to determine whether the project has complied with 21.24.090." (E. 664).

Chairman Elkington then polled each member for their determination as to whether all of the criteria had been demonstrated by QW Properties. For example, the poll for Board Member Zazzali began as follows:

> Mr. Chairman: ...As to Letter A, do you find that the development is compatible to the character of the surrounding neighborhood, Comprehensive Plan and the purposes of planned development?
>
> Mr. Zazzali: I do.
>
> Mr. Chairman: ...As to B, do you find that the locations of the building structures, open spaces, landscape elements and pedestrian vehicular circulation systems are adequate?
>
> Mr. Zazzali: I do not.

(E. 664-665).

This polling process continued until the Board Members had each been polled. In total the poll revealed that 3 of the 4 Board Members had found that compliance with a

criterion had not been demonstrated. Board Member Zazzali determined criterion B was not met. Board Member Gregory found that criterion A was not met. (E. 667) Chairman Elkington found that "notwithstanding the Facilities Agreement, I find that F has not been met as to facilities as to infrastructure surrounding [the Proposed Development]." (E. 668). Only Board Member Latham found that all criteria had been demonstrated. (E. 666).

Immediately following the polling, Board Member Gregory asked for clarification on the voting procedure. Chairman Elkington explained that the polling method was purely for the purpose of creating a clear record of which criteria the Board Members determined were not met. He stated, "Had we taken just an overall vote we would not have known which individual provision someone may have not felt was met." (E. 672-73). He then ruled that in order for any given Board Member to vote to approve the Application, that Board Member must find that all six criteria have been met. He explained it as, "if there's a finding by any individual that any one of the criteria is not met it by definition under the Code must be a no vote." (E. 673).

In accordance with the requirement that each Board Member must find all criteria demonstrated in order for that individual Board Member to vote for approval – and that three Board Members had each found a criterion had not been demonstrated – the Board concluded that the Application was denied by a 3-1 vote. (E. 675).

Because the Board denied the Application, it did not proceed to consider the conditions proposed by the Planning Department and Planning Commission, as such conditions were only necessary if the Application were to be approved.

STANDARD OF REVIEW

In reviewing the decision of an administrative agency, the Court of Special Appeals "reviews the agency's decision directly, not the decision of the circuit court." *Marks v. Criminal Injuries Comp. Bd.,* 196 Md. App. 37, 55, 7 A.3d 665, 675 (2010). The Court of Special Appeals also applies "the identical standard of review as that employed by the circuit court." *Id.*

"Although [the courts] retain the power to review administrative decisions, judicial review of these decisions is narrow." *Frey v. Comptroller of The Treasury.*, 422 Md. 111, 29 A.3d 475, 490 (2011). This means the courts "shall not substitute [their] judgment for the expertise of those persons who constitute the administrative agency." *Ibid* (internal quotation omitted). Accordingly, "[a]dministrative agency decisions are not set aside unless the decision is arbitrary, illegal or capricious." *Archers Glen v. Garner*, 933 A.2d 405, 413, 176 Md. App. 292 (Md. App., 2007).

The Court of Appeals has held that the following principles govern review of administrative agency decisions:

> A court's role in reviewing an administrative agency adjudicatory decision is... limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law.
>
> In applying the substantial evidence test, a reviewing court decides whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. A reviewing court should defer to the agency's fact-finding and drawing of inferences if they are supported by the record. A reviewing court must review the agency's decision in the light most favorable to it;...the agency's decision is prima facie correct and presumed valid, and...it is the agency's province to resolve conflicting evidence and to draw inferences from that evidence.

> ...a court's task on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency. Even with regard to some legal issues, a degree of deference should often be accorded the position of the administrative agency. Thus, an administrative agency's interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts. Furthermore, the expertise of the agency in its own field should be respected.

Motor Vehicle Admin. v. Shea, 415 Md. 1, 14-15, 997 A.2d 768, 775-76 (2010).

ARGUMENT

The Circuit Court's reversal of the Board's order was an egregious failure to afford any deference whatsoever to the Board's reasonable interpretation of its own voting procedure rule. The Circuit Court also entirely undid the City of Annapolis' regulatory process and efforts because, rather than remand the Application for further consideration, the Circuit Court ordered that the Application was outright approved; therefore, the Proposed Development is not subject to any of the conditions recommended by the Planning Department and Planning Commission.

I. WHETHER THE BOARD OF APPEALS' INTERPRETATION OF ITS OWN VOTING PROCEDURE RULE WAS ARBITRARY AND CAPRICIOUS.

The Annapolis City Code provides the review criteria that the Board of Appeals must consider. *See*, 21.24.090. The Maryland Code and Code of the Annapolis City Code empower the Board of Appeals to adopt its own rules to govern how it considers those criteria and its voting procedure. *See*, Md. Code, Land Use § 4-304(a) ("A board of appeals shall adopt rules in accordance with any local law adopted under this division.");

Annapolis City Code, § 21.08.040(D) ("The Board of Appeals shall adopt rules in accordance with the provisions of this section...").

Pursuant to that authority, the Board adopted Rule 5.3, which governs the Board's voting procedure. Rule 5.3 states:

> "Decisions on any *matter* before the Board shall require the affirmative vote of a majority of the Board members participating in the matter. Failure to achieve the necessary votes shall result in the denial of the application or petition, or the action appealed from shall be affirmed." (emphasis added).

Although § 21.24.090 contains multiple review criteria, the Board of Appeals considered the "matter" it voted on to be whether the Application demonstrated compliance with § 21.24.090 overall. Thus, each Board Member casts a single vote as to whether compliance has been demonstrated with § 21.24.090. To that end, the Board of Appeals interpreted its own voting procedure rule in the reasonable fashion that in order for any given Board Member to vote for approval, *that* Board Member must find all of the criteria within § 21.24.090 to have been adequately demonstrated. Put another way, if a Board Member finds a single criteria has not been demonstrated, that Board Member must vote for a denial of the Application.

For the explicit purpose of providing a clear record, the Board of Appeals polled its members on each individual criterion so that the record would be clear as to which criteria the members had found lacking.

The results of the poll were that Board Member Zazzali found criterion B had not been met. (E. 665). Board Member Latham found that all criteria had been met. (E. 666-

67). Board Member Gregory found that criteria A had not been met. (E. 667). And Chairman Elkington found that criterion F had not been met. (E. 668).

The results of the poll are demonstrated in the following chart:

	Criteria A	Criteria B	Criteria C	Criteria D	Criteria E	Criteria F	**Vote**
Zazzali	Yes	**No**	Yes	Yes	Yes	Yes	**Denial**
Latham	Yes	Yes	Yes	Yes	Yes	Yes	**Approval**
Gregory	**No**	Yes	Yes	Yes	Yes	Yes	**Denial**
Elkington	Yes	Yes	Yes	Yes	Yes	**No**	**Denial**

The criterion-by-criterion poll was for the explicit purpose of clarity in the record – not to convert the "matter" the board voted on into each individual criterion. This was clearly stated on the record during the deliberation hearing. Chairman Elkington stated, "Had we taken just an overall vote we would not have known which individual provision someone may have not felt was met." (E. 672-673). Chairman Elkington further held on the record that "I think that the way we have done it in this way better preserves the record in this particular case, and if there's a finding by any individual that any of the criteria is not met it by definition under the Code must be a no vote." (E. 673) (emphasis added).

It is well settled that the courts are empowered to review the legal conclusions of administrative agencies. However, it is equally well settled that a great deal of deference is afforded to the agency when it is interpreting its own rules. *Frey v. Comptroller of the Treasury.*, 422 Md. 111, 138, 29 A.3d 475 (Md., 2011) ("[j]ust as [the courts] defer to an

agency's factual findings, [they] afford great weight to the agency's legal conclusions when they are premised upon an interpretation of the statutes that the agency administers and the regulations promulgated for that purpose.").

The Circuit Court held that the Board's vote was arbitrary and capricious because "although there was an overwhelming majority in favor of approval based on the criteria-by-criteria roll call vote...[it was declared] that the vote was three to one against the application." (E. 326-327).

Basically the Circuit Court held that because there were more yes-votes than no-votes it was error to deny the Application. That finding wholly disregarded the deference owed to the Board of Appeals. The Board of Appeals implemented a reasonable interpretation of its own voting procedure that the "matter" was overall compliance with § 21.24.09 and therefore for an individual member to vote for approval, that member must have found each of the criteria within § 21.24.090 was demonstrated.

The Board of Appeals interpreted its own voting procedure rule in a reasonable manner. It then applied that reasonable interpretation to reach its order that the Application was denied. In light of the deference that must be afforded to agency interpretations of their own rules, the Circuit Court's finding that the Board's vote was arbitrary and capricious was clear error. Therefore, the Circuit Court's order must be reversed and the Board's denial of the Application reinstated.

II. WHETHER THE BOARD OF APPEALS' DENIAL OF THE APPLICATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

(i) The Remaining Issues That The Circuit Court Found Moot Should Be Addressed By This Court.

QW Properties challenged the Board's order on three issues before the Circuit Court: the voting procedure, whether the denial was supported by substantial evidence, and whether the Board's written opinion set out sufficient supporting facts. The Circuit Court found that QW Properties' second and third bases for appeal were moot based on its reversal on the voting issue. The Application has been the subject of review by the Planning Department, Planning Commission, Circuit Court, and now the Court of Special Appeals. The Application and the Board's decision warrant finality. Therefore, Appellants request that the Court address the remaining two appeal bases so that this matter may finally be disposed of.

(ii) The Board Of Appeals' Denial Was Supported By Substantial Evidence.

Court review of agency fact-finding is "narrow and highly deferential." *Pomeranc–burke v. Wicomico Envtl. Trust*, 197 Md.App. 714, 14 A.3d 1266, 1285 (Md. App., 2011). Substantial evidence exists when there is "such relevant evidence as a reasonable mind might accept as adequate to support" the Board's denial. *Annapolis Market Place, LLC v. Parker*, 802 A.2d 1029, 1038, 369 Md. 689 (2002).

QW Properties' argument in the Circuit Court that the Board's decision was not supported by substantial evidence could not be farther from the truth. The record demonstrates that substantial expert evidence supported the Board's finding that QW Properties failed to demonstrate compliance with § 21.24.090 criteria A, B, and F.

A. § 21.24.090(A) – COMPATIBILITY

The Reserve at Quiet Waters design places a "cluster of single-family homes" in the southwest corner of the site. (E. 406). That section of land is currently occupied by a grouping of trees – referred to at the hearings as the "Priority 1 forest" – that are contiguous to Quiet Waters Park. (E. 370). The cluster of homes in the southwest corner requires removal of those trees.

Annapolis City Code § 21.24.090(A) required QW Properties to demonstrate:

> "The planned development is compatible with the character of the surrounding neighborhood and the Comprehensive Plan and *the purposes of planned developments*." (emphasis added).

In turn, § 21.24.010(A)(5) defines the purpose of planned developments as, "[t]o encourage a design that takes into account the natural characteristics of the site in the placement of structures." At the hearing there was no dispute that the Priority 1 forest qualified as a natural characteristic of the site. QW Properties' own counsel agreed the Priority 1 forest stand was an important natural characteristic of the site. (E. 560). Therefore, it was undisputably appropriate for the Board to consider whether the removal of the Priority 1 forest stand was consistent with taking into account the natural characteristics of the site.

There was substantial evidence presented that removal of the Priority 1 forest was not in keeping with the natural characteristics of the site. QW Properties alleged that removal of the Priority 1 forest was acceptable because the area was of low value due to previous disturbances. (E. 407). The past disturbances had been an insect infestation that killed oak trees and a strong wind event that caused pines to fall over. (E. 414).

However, substantial expert evidence was raised that contradicted the premise that past disturbances lowered the importance of the Priority 1 forest to the natural characteristics of the site. First, Ross Geredien, testified that QW Properties' argument was based on "false assumptions ignoring basic principles of forest ecology." (E. 485). Specifically, he testified QW Properties was wrong that the dead and downed trees degraded the Priority 1 forest's value because "down and dying trees are vital components of decomposition and nutrient cycling." (E. 486). In addition, Mr. Geredien testified the conditions of the site "indicate[] that this is a forest in transition from an early successional stage to a mid or late successional stage." That meant that "[i]n all likelihood these dying trees will give way to younger oaks, hickories, maples and other longer lived and more shade tolerant hardwood species." (E. 486-488) (emphasis added). Further, Mr. Geredien testified that it is "well known that forest fragmentation leads to increased colonization by invasive plants...In other words, invasive plants currently on or near the property will likely multiply and penetrate farther into Quiet Waters Park once the site is disturbed and developed." (E. 486-487).

The Board understandably took great consideration of Mr. Geredien's expert testimony because he is "an environmental scientist specializing in landscape ecology, conservation planning, with experience and expertise in...forest ecology." (E. 482). Mr. Geredien's professional expertise was further backed by his educational qualifications of graduating summa cum laude from the University of Maine with a Bachelor of Science and Natural Resources and a Master of Environmental Management degree from the Yale School of Forestry. (E. 482).

Additional expert testimony rebutting QW Properties' assertion was provided by Ted Weber. Mr. Weber is a professional environmental scientist with 15 years of experience, a master's degree in System's Ecology from the University of Florida, and multiple papers published in peer reviewed journals such as Forest Ecology and Management. (E. 467, 471). Mr. Weber testified that he had viewed the Priority 1 forest and "it's in the natural process of healing." (E. 468).

There is no doubt substantial evidence supported the Board's finding that QW Properties had not satisfied criterion A because the Priority 1 forest was an important natural characteristic of the site and QW Properties' sole justification for its removal was based on erroneous assumptions. The Board even noted as much during the hearings; Board Member Gregory stated: "we had several members of the Annapolis community who testified with similar credentials who disagree. So we've heard testimony on both sides." (E. 648).

B. § 21.24.090(B) – TRAFFIC

The Reserve at Quiet Waters is estimated to create 1,400 automotive trips on a typical weekday and 1,600 trips on a typical Saturday. (E. 342). The majority of those trips will be condensed to two times: 7:00-9:00 a.m. and 3:00-6:00 p.m. (E. 350). And all of those trips will be at the sole point of egress for vehicular traffic, i.e. turning from Annapolis Neck Road onto Forest Drive.

Annapolis City Code § 21.24.090(B) required QW Properties to demonstrate:

> "The proposed locations of buildings, structures, open spaces, landscape elements, and pedestrian and *vehicular circulation systems are adequate, safe, and efficient*

and designed to minimize any adverse impact upon the surrounding area." (emphasis added).

At the hearing, substantial evidence was raised that QW Properties had not demonstrated the vehicular traffic would be managed in an adequate, safe, and efficient manner. It was undisputed that as the Annapolis Neck Road/Forest Drive intersection existed, it was not sufficient to allow for safe egress. Janet Norman, who has lived on Annapolis Neck Road for 12 years, testified to the "death-defying" nature of trying to make a left turn onto Forest Drive because it required starting from "a dead stop on an incline [and] going into 50 to 55 mile an hour traffic." (T2, p. 59).

Ms. Norman's opinion was confirmed by QW Properties' own experts. QW Properties' own traffic expert, Michael Lenhart, testified that their 2008 traffic study found the existing intersection of Forest Drive and Annapolis Neck Road "[did] not meet [American Association of State Highway and Transportation Officials] design criteria." (E. 434-435). He further determined "the intersection has insufficient sight distance looking to the east," i.e. the sightline needed to make a left turn onto Forest Drive. (E. 435). Specifically, Mr. Lenhart determined the intersection was inadequate because it only had 350 feet of sight distance looking east and based on AASHTO national guidelines, 350 feet of sight distance would only accommodate a 35 mph travel speed on Forest Drive. (E. 592). However, the 2011 traffic study determined vehicles were traveling at 55 mph on Forest Drive. (E. 593).

As stated by QW Properties' expert, Mr. Lenhart: "Therefore, today you have sight distance that [] accommodates travel speeds of 35 miles per hour and people are

travelling at 55 miles per hour." (E. 593). Mr. Lenhart then stated that he agreed with Ms. Norman's testimony that it is hard to make a left turn as the intersection exists and added that, "[s]ight distance is not sufficient for today's speeds." (E. 593) (*See also*, Mr. Lenhart's written submission stating "we would concur that the existing intersection is not designed for safe egress to satisfy the AASHTO design criteria" (E. 211)).

The left turn issue is especially problematic because 87% of the morning peak traffic turns left. (E. 462).

In light of the existing inability of the intersection to handle the Proposed Development, three remedial options were discussed at the hearings: (1) install a traffic control signal (i.e., traffic light) at the Annapolis Neck Road/Forest Drive intersection; (2) revise the Forest Drive median by removing 250 feet of the median; or (3) provide a new connection from the southern portion of Annapolis Neck Road "through Quiet Waters Park" to Hillsmere and Forest Drive as a secondary area access. (E. 343; E. 53-55).

The evidence before the Board demonstrated that each of these 3 options had serious deficiencies. The first option, installation of a traffic light, required Anne Arundel County approval. (E. 351-352). Before that approval could be given, the County first required "Traffic Signal Warrant Studies." (E. 437). However, QW Properties had not conducted any traffic signal warrant study. Even assuming when a study is completed it would support installation of a traffic light, the County "[has] some reluctance to approve a traffic signal because their fear is we add another traffic signal...it's going to delay through traffic on Forest Drive even more so than it is today." (E. 351-352).

Rodney Plourde, who conducted the 2011 traffic study, reiterated that, "the important thing to note, again...is the County's interest is in pushing through traffic on Forest Drive. All its timing and phasing and coordination is to move through traffic on Forest Drive at the expense of cross traffic." (E. 357-358). This assessment was concurred with by Jon Arason, Director of the Planning Department, who stated that "[t]he way Forest Drive is being set up now...is that every available second of time at a signalized intersection is being given to Forest Drive to keep traffic moving through...[B]ecause they've devoted more time to moving traffic down Forest Drive...the side streets have less green time." The hearing testimony demonstrated that County approval to install a traffic signal was not guaranteed and may even be unlikely.

The second option, revising the median by removing 250 feet, also required creating a center two-way left turn lane. Both the median removal and turn lane would require County approval. However, those proposals had only been "reviewed by the County...and that's all part of the ongoing discussions with the County." (E. 595) There was no binding agreement yet that the County would approve the modifications. Even assuming there would be County approval, the 2011 traffic study found the option would not create safe driving conditions because "this option will not result in a modification to traffic flow along Forest Drive." (E. 54). The traffic will still be flowing at 55 and 50 miles per hour and "[a]s traffic volumes continue to grow across the region, the number of available gaps for traffic to safely access Forest Drive from Annapolis Neck Road will decrease..." (E. 54). The 2011 traffic study concluded that the net effect of the increased volume and high vehicle speeds on Forest Drive meant the median removal option

"would continue to have safety concerns associated with Annapolis Neck Road, as well as increasing delays for Annapolis Neck Road exiting traffic." (E. 54). The median removal option left significant safety concerns even for QW Properties' own experts.

The third so-called option, to provide a new connection through Quiet Waters Park to a secondary access point, was really no option at all. Mr. Plourde, who conducted the 2011 traffic study, testified "that alternative, the connection through Quiet Waters Park, was dropped from further consideration during our Planning Commission hearings." (E. 344).

The above problems alone raised substantial evidence at the hearings that QW Properties had not demonstrated it could ensure "adequate, safe, and efficient" vehicular systems in compliance with § 21.24.090(B). QW Properties' failure to demonstrate compliance, however, was further exacerbated by the fact that it had only presented theoretical options; it made no commitment whatsoever as to which option would actually be implemented.

In the first hearing session, Chairman Elkington voiced his concern that QW Properties had not actually committed to one concrete, specific plan for the Board to review. He specified that the Board was still "trying to get down to what do we honestly expect at this intersection" and that the vague assertion of options, rather than a concrete plan, left the Board in the awkward position of "hav[ing] to make a decision whether or not we're going to approve an intersection which may or may not be approved by the County." (E. 448). QW Properties never rebutted that concern. At the final hearing, Chairman Elkington reiterated that the theoretical nature of the options remained an

issue. (E. 625) (noting the testimony "couldn't be particularly definitive about those options because Forest Drive is owned by the County, not the City" and that no particular remedy was "mandated").

Board Member Zazzali also raised his concern that even though QW Properties had repeatedly emphasized that the County determined the additional traffic on Forest Drive was acceptable to them, the County's opinion did not take into account "how bad life would be on [Annapolis Neck Road]." (E. 621). And he further explained that "there was not a lot of evidence to suggest that [exiting the Reserve at Quiet Waters] would be safe..." (E. 622) (emphasis added).

Substantial evidence at the hearing demonstrated that serious problems existed with QW Properties' options to ensure adequate, safe, and efficient traffic in compliance with criterion B. Compounding that with the fact that only theoretical options had been presented, not a concrete, specific plan for the Board to review, the Board's denial was supported by more than enough relevant evidence for a reasonable mind to accept as adequate.

C. § 21.24.090(F) – PUBLIC WATER FACILITIES

Water is proposed to be provided to the Reserve at Quiet Waters' 156 lots and facilities by connecting into the existing city water utilities in the vicinity. (E. 424).

Annapolis City Code § 21.24.090(F) required QW Properties to demonstrate:

> "The planned development plan includes adequate provision of public facilities and *the proposed infrastructure, utilities* and all other proposed facilities *are adequate* to serve the planned development and adequately interconnect with existing public facilities."

Substantial evidence was raised at the hearings that QW Properties had not made a specific, concrete proposal to ensure water facilities could adequately serve both the development and the surrounding area. It was undisputed that the current utility lines were not sufficient. QW Properties' civil engineer, Jerry Tolodziecki, testified that "given the problem with static pressure in the area," tying into city lines alone would not suffice. (E. 428-429). A May 1, 2012 Adequate Public Facilities Mitigation Agreement ("Mitigation Agreement") between QW Properties and the City of Annapolis reflected the same conclusion. That agreement stated that QW Properties prepared its own analyses regarding water supply and concluded "that public water facilities are not sufficient...because of inadequate water pressure and improvements are required to provide 'adequate public water' for development of the Property." (E. 4).

QW Properties' response to the problem at the hearings was no more than to reiterate that they were bound by the Mitigation Agreement. (E. 585). However, the Mitigation Agreement as described by QW Properties' own civil engineer only meant QW Properties and the City "will work together to study the potential solutions to solve the static pressure, and then the City will approve a specific method to improve the pressure." (E. 424) (emphasis added). Review of the Mitigation Agreement itself confirms that understanding. The Mitigation Agreement states, "QW Properties shall provide to the City a formal written water study...containing findings, conclusions and recommendations, which describes and analyzes in detail the potential alternatives for the provision of adequate public water for the Property." (E. 4). Then, regarding the potential

options, it states the "improvements required...include one or more of the following options." (E. 4) (emphasis added).

The options provided by the Mitigation Agreement were to (1) construct a new water tower, (2) construct a booster station, or (3) improve the existing water system. Notably, the Mitigation Agreement only provided options; it did not specify which method or methods *would be* implemented. And QW Properties had not yet conducted the required study. This put the Board in the impossible position of trying to determine whether water facilities would be adequate without knowing how the well-established water pressure problem would be addressed.

Once again, just as with the traffic issue, the Board expressed its concern over trying to review a plan made up only of potential options. Board Member Elkington stated he took into account the Mitigation Agreement, but "its [the Mitigation Agreement] I find to be inadequate." (E. 670).

It was undisputed at the hearing that the available water utilities were not sufficient for adequate provision of water to the development and the surrounding area. Because there were no specific, concrete plans for dealing with water utility deficiencies the Board was supported by substantial evidence in its finding that compliance with criterion F had not been demonstrated.

(iii) WHETHER THE BOARD OF APPEALS' WRITTEN OPINION SUFFICIENTLY RECITED ITS FACTUAL FINDINGS UNDERPINNING ITS DENIAL OF THE APPLICATION.

Finally, in the Circuit Court, QW Properties challenged the Board's order by alleging that the Board's written opinion did not adequately support its decision with factual content from the record. Indeed, administrative opinions must set out their factual underpinnings. *See, Bucktail, LLC v. Cnty. Council of Talbot Cnty.,* 352 Md. 530, 553, 723 A.2d 440, 451 (1999) ("Findings of fact must be meaningful and cannot simply repeat statutory criteria, broad conclusory statements, or boilerplate resolutions.).

In *Sweeney v. Montgomery Cnty.,* 107 Md. App. 187, 199, 667 A.2d 922, 927-28 (1995) this Court suggested administrative opinions seek to track the following format:

> "An acceptable format for the Board's findings and conclusions...would be to set out its finding that the particular requirement had, or had not, in its opinion, been established by the applicants and then add, 'because the Board finds the following facts to be true.' (Insert the facts here) 'and does not accept as true the following testimony or evidence.'(Insert the rejected testimony [or evidence] here). In this way, a court on appeal will be able to ascertain whether there was sufficient evidence to support the Board's findings and conclusions."

The Board's opinion did just what was suggested in *Sweeney*. For each of the three criteria that resulted in the denial, the Board's opinion stated which specific evidence was credited and discredited.

For criterion A, the Board's opinion stated which evidence it relied on:

> "With respect to Criteria A...Mr. Gregory's opinion was that the design of the development as proposed, specifically the 38 building lots in the southwest corner on which residences were to be located, did not meet Criteria A. ... More particularly, the southwest corner residential design was inconsistent with the priority one forest stand which had been identified as existing in the southwest corner...Therefore, the intensification of residential development in the southwest comer was clearly out of line with the natural characteristic of that particular area." (E. 89).

The Board also stated which evidence it had discredited for criterion A. (E. 89-90). Then, for criterion B, the Board's opinion stated which evidence it relied on:

> "With respect to traffic impact relating to vehicular circulation systems...both Mr. Elkington and Mr. Zazzali determined that public roads were inadequate to support the proposed development. In relying on the testimony of the City traffic planner, the public roads, without an additional traffic light or several different possible changes to the travel lanes, were not able to support the increased traffic that would result from a development with 158 new households. Mr. Zazzali was also concerned about traffic safety due to increased traffic congestion." (E. 90).

And the Board also stated which evidence regarding criterion B it had discredited:

> "[Mr. Zazzali] felt that the traffic study was deficient in that times that were selected for analysis were comprehensive enough to take into consideration all aspects of [probable] traffic intensification at the intersection of Forest Drive and Annapolis Neck Road and along Forest Drive. Mr. Elkington felt that the City's reliance on Anne Arundel County to make changes to County roads in the area, if any, was not acceptable and he concluded that the public roads, therefore, were insufficient to handle traffic intensification issues. In the final analysis, both Mr. Elkington and Mr. Zazzall felt that there was not much evidence and no plan presented by the Applicant as to how make the roads safe and sufficient given the demands of a new intensive development in the area." (E. 90).

Finally, for criterion F, the Board's opinion stated which evidence it relied on:

> "With respect to adequacy of the public facilities (Criteria F)...There was public testimony regarding inadequacy of water pressure in residences in proximity to the site of the proposed development. The agreement recognized inadequacy of existing water pressure and that water and sewer infrastructures required modification. There were alternatives as to how this would happen, but no guarantees that it could happen. Basically, the City and the Applicant had no clear idea of what would be required, including the possibility that a water tower would need to be constructed. The Applicant promised to do what was necessary, but there was no plan in place. Essentially, the testimony supported a finding that the public facilities were not adequate to support the development without modification and there were no plans to address this issue beyond suggestions of what the Applicant might be inclined to do. There was no consensus about which plan, or plans, would be necessary to ensure that public facilities would be adequate." (E. 90).

And the Board stated which evidence it had discredited for criterion F:

> "Mr. Elkington determined that, despite the existence of the public facilities agreement, and despite it being clear that the City's Department of Public Works negotiated an agreement that was satisfactory to it, there was no assurance that the Applicant would be able to meet the requirements of that agreement, despite its acknowledgement that it was bound to the agreement. ... Essentially, the Applicant did not know for certain that it could carry out its obligations under the agreement, although the Applicant made it clear that it intended to do so." (E. 90).

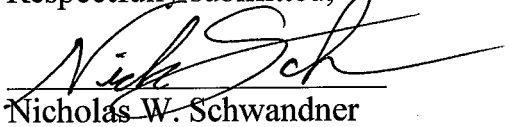
The excerpts above establish that QW Properties' allegation that the Board failed to explain its analysis was simply not supported. The excerpts show that the Board's opinion did exactly as *Sweeney* suggested should be done. There is no need to resort to any assumptions or inferences for what the Board may have based its decision on, as it was explicitly stated in the written opinion. Coupled with the Board's criteria poll and oral deliberations totaling almost 70 transcript pages, the Board certainly set out the factual underpinnings for its denial. Because the opinion meets the *Sweeney* standard it was not arbitrary and capricious.

CONCLUSION

The Board's interpretation of its own voting procedure rule was reasonable. It merely required three of the four Board Members to find that all required criteria had been adequately demonstrated. The Circuit Court violated the deference afforded to administrative agencies by ordering that the vote was arbitrary and capricious. Moreover, as a result of the Circuit Court substituting its judgment for that of the Board and ordering the Application outright approved, the Circuit Court nullified the City of Annapolis' regulatory efforts and caused the Application to be approved without being subject to any conditions. And as described above, the remaining challenges to the Board's order were equally unfounded.

For these reasons, Appellants request that the Circuit Court's order be reversed and the Board's denial of the Application reinstated. In the alternative, at the very least, the Application should be remanded back to the Board for further consideration so that the Board may effectuate the regulatory process.

Respectfully submitted,



Nicholas W. Schwandner

Harrison Law Group
40 W. Chesapeake Ave.
Suite 600
Towson, MD 21204
P: (410) 832-0000
F: (410) 842-0155
nschwandner@harrisonlawgroup.com

STATUTORY PROVISIONS, CODES AND RULES

Annapolis City Code § 21.24.090 Planned development review criteria and findings.

In deciding planned development applications the Board of Appeals shall make written findings based on the following:

A. The planned development is compatible with the character of the surrounding neighborhood and the Comprehensive Plan and the purposes of planned developments.

B. The proposed locations of buildings, structures, open spaces, landscape elements, and pedestrian and vehicular circulation systems are adequate, safe, and efficient and designed to minimize any adverse impact upon the surrounding area.

C. The planned development will promote high quality design and will not result in greater adverse impacts to the surrounding area compared to the development that may otherwise be permitted pursuant to the Zoning Code if a planned development were not approved.

D. The planned development complies with the planned development use standards and bulk and density standards.

E. The planned development complies with the Site Design Plan Review criteria provided in Section 21.22.080

F. The planned development plan includes adequate provision of public facilities and the proposed infrastructure, utilities and all other proposed facilities are adequate to serve the planned development and adequately interconnect with existing public facilities.

STATEMENT OF FONT TYPE AND SIZE

This brief was prepared entirely in Times New Roman 13-point font.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2014, two copies of the foregoing Appellants' Brief and the Record Extract were served via First-Class mail, postage pre-paid, upon the following:

Benjamin Rosenberg, Esquire
Rosenberg Martin Greenberg, LLP
25 South Charles Street, 21st Floor
Baltimore, Maryland 21201

Counsel for Appellee,
QW Properties, LLC

Nicholas W. Schwandner